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NO. A-735

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JAMES CURTIS McCRAE

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

QUESTIONS PRESENTED

1. In a felony murder conviction in which the felony murder constitutes the sole basis for the Petitioner's conviction of murder in the first degree, does the failure of the trial court to instruct the jury that the Petitioner is presumed innocent of the underlying felony involved in the felony murder violate the Sixth, Eighth and Fourteenth Amendments to the United States Constitution?

2. In a felony murder conviction in which the felony murder constitutes the sole basis for the Petitioner's conviction of murder in the first degree, does the failure of the trial court to instruct the jury that before the Petitioner can be convicted of felony murder, the underlying felony involved in the felony murder must be proved beyond a reasonable doubt violate the Sixth, Eighth and Fourteenth Amendments to the United States Constitution?

3. In a felony murder conviction in which the felony murder constitutes the sole basis for the Petitioner's conviction of murder in the first degree, does the trial court's failure to instruct on the elements of the underlying felony charged in the felony murder indictment violate the Sixth, Eighth and Fourteenth Amendments to the United States Constitution?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida filed on September 14, 1982 which vacated its prior opinion of March 25, 1982. Rehearing on the September 14, 1982 opinion was denied on December 16, 1982.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported as McCrae v. Wainwright, 422 So.2d 824 (Fla. 1982) and is set out at pages 1a-4a in the Appendix. The prior opinion of March 25, 1982 which was vacated is set out at pages 5a-6a in the Appendix, and the order denying rehearing is set out at page 7a of the Appendix.

JURISDICTION

The judgment of the Supreme Court of Florida was filed on September 14, 1982 and Petitioner's timely motion for rehearing was denied on December 16, 1982. On March 8, 1983, Justice Powell signed an order extending the time for filing the petition for writ of certiorari to and including April 15, 1983. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), Petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 782.04, Florida Statutes: Murder

> (1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, the abominable and detestable crime against nature or kidnapping, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in s. 775.082.

STATEMENT OF THE CASE

On November 14, 1973, the Petitioner was indicted for the crime of first degree murder of Margaret Mears (R-822).[1] The indictment charged premeditated murder in count one and felony murder in count two (R-940). The case went to trial on April 15, 1974 in the Twentieth Judicial Circuit Court, Lee County, Florida with Circuit Judge William Lamar Rose presiding. Following the selection and swearing of the jury, the judge gave the jury certain basis instructions regarding the nature of the trial. He began with the following:

[1]The letter "R", followed by the appropriate page numbers, will be used to designate references to Record on Appeal before the Supreme Court of Florida.

THE COURT: Be seated and give me your attention. Ladies and gentlemen of the jury, inasmuch as some of you have never sat on a jury before, I think it necessary that I kind of tell you something about the progress of a trial and what you may expect. You have been sworn and selected as a jury to try the case of the State of Florida versus James Curtis McCrae. This is a criminal case. The defendant is charged with the crime of first degree murder, it being a capital offense. All of the elements of the charge and some of the lesser included charges I'll give to you at a later time during these proceedings. (R-341) (Emphasis added)

Shortly thereafter the judge went on to say:

Now, there are some other things that I want to tell you about. The indictment that's been found in this case - and that's this paper here which will be read to you probably many times during this trial - that in and of itself constitutes no evidence. In and of itself, the indictment carries no inference of guilt whatsoever. It is only the means whereby the defendant is alleged to have committed something and is in this courtroom for the purpose of his trial, and that only. (R-344)

Following the judge's remarks, opening statements were made.

The prosecutor, in his opening stated the following:

His Honor has mentioned to you the indictment in this case which, as he cautioned you, is not evidence, and that's just what I say. It's not evidence. The indictment is the charging document which notifies the defendant and the public that the case is coming up and which brings the defendant in this case into this courtroom. (R-348)

The prosecutor went on to say:

I think the evidence will show actual premeditation in the murder and premeditation to be found through the act of rape. I believe His Honor will instruct you on those various points at the conclusion of this trial.

Now, on voir dire yesterday you heard several questions about the statement, proving all the elements and will you make the State prove all the elements. Well, those are the elements, the charges in the indictment and the material portions of that indictment, plus what His Honor will instruct you on the specific elements at the close. (R-351, emphasis added)

When the prosecutor concluded his opening statement, the defense attorney gave his. The defense attorney addressed the jury as follows:

Similarly, the indictment that's been handed down against my client is not evidence in this case. As His Honor, Judge Rose, has instructed you, this is simply a tool by which my client was brought before this Court. It has no evidentiary value whatsoever. It's just a piece of paper and that's all. (R-355)

Following opening statements, the prosecution presented its case through twenty-two (22) witnesses. The medical examiner, Dr. Peter Rosier, testified as to the autopsy of the victim. There were multiple lacerations on the face, blunt trauma to the area over the left eye, much bruising on the chest, and broken ribs. The doctor stated that the victim died of "flail chest"; the broken ribs made it impossible to breathe. It took her no more than four minutes to die. (R-504). The doctor further testified that petitioner's blood type was A Rh positive but the attempt to match it to blood in the partment was inconclusive. (R-518). The doctor said the rape could have occurred either right before or after death. (R-519).

Additional evidence was presented regarding a palm print and fingerprint found in the deceased's apartment which were identified as petitioner's (R-703). Following the State's case, the petitioner took the stand and denied committing the crime (R-726).

In closing argument, the prosecutor discussed the aspect of premeditated murder as charged in count one of the indictment and felony murder as charged in count two. The prosecutor then injects that another felony may have been the motive for this killing and that felony is robbery (R-794). He then asks the jury to convict on both counts (R-812).

The court began its instructions to the jury by reading the indictment (R-822). Count I read as follows:

> [O]ne JAMES CURTIS McCRAE did unlawfully, feloniously and from a premeditated design to effect the death of one MARGARET MEARS, did strike, beat, bruise and wound the said MARGARET MEARS, thus and thereby inflicting on and upon the head or body of the said MARGARET MEARS certain mortal wounds of which said mortal wounds the said MARGARET MEARS did between October 13, 1973 and October 15, 1973 die; contrary to the statute in such case made and provided and against the peace and dignity of the State of Florida.

Count II read as follows:

> [O]ne JAMES CURTIS McCRAE did unlawfully and feloniously effect the death of MARGARET MEARS in perpetrating or attempting to

perpetrate a rape, to-wit: did unlawfully and feloniously ravish and carnally know a female of more than ten (10) years of age, to-wit: MARGARET MEARS, by force and against her will, contrary to the statute in such case made and provided and against the peace and dignity of the State of Florida. (R-822,823)

The court then defined premeditated murder as follows:

> A premeditated design to kill is a fully formed conscious purpose to take human life, formed upon reflection and present in the mind at the time of the killing. The law does not fix the exact period of time which must pass between the formation of the intent to kill and the carrying out of the intent. It may be only a short time and yet make the killing premeditated, if the fixed intent to kill was formed long enough before the actual killing to permit of some reflection on the part of the person forming it, and that person was at the time of carrying out that intent fully conscious of a settled and fixed purpose to kill and of the results which would follow such killing. When such state of mind exists there is a premeditated design to kill, although the killing follows closely upon the formation of the intent. (R-828,829)

He then defined felony murder as follows:

> The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping in murder in the first degree even though there is no premeditated design or intent to kill.
>
> If a person kills another while he is trying to do or commit any arson, rape, robbery, burglary, the abominable detestable crime against nature or kidnapping, or while escaping from the immediate scene of such crime the killing is in the perpetration or in the attempt to perpetrate such arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping and is murder in the first degree. (R-830,831)

The above was the extent of the instructions given on felony murder in the first degree. The court then instructs the jury that they can convict on count one, count two, or both. (R-849). The court submitted written instructions to the jury also. The written instruction regarding felony murder read as follows:

> The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree even though there is no premeditated design or intent to kill.
>
> The crime of (name crime applicable to evidence) defined as follows: (define other felony).

> If a person kills another while he is trying to do or commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping, or while escaping from the immediate scene of such crime the killing is in the perpetration of or in the attempt to perpetrate such arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping and is murder in the first degree. (R-1034).

As can be seen by comparing the instruction read to the jury (R-830) with the written instruction submitted to them (R-1034), the court in reading the instruction omitted the middle paragraph which read:

> The crime of (name crime applicable to evidence) defined as follows: (define other felony).

The jury, after their deliberations, returned a verdict convicting the petitioner of count two - the felony murder count (R-1060). Following this conviction, the jury again deliberated as to the advisory verdict and returned a recommendation for life (R-1069). The court then entered a sentencing order imposing death upon the petitioner (R-1090-95).

THE APPEAL

A direct appeal was taken to the Florida Supreme Court which rendered its opinion cited as McCrae v. State, 395 So.2d 1145 (Fla. 1981) and contained in Appendix at pages 8a-19a. On March 4, 1982, the Governor of the State of Florida signed petitioner's death warrant and petitioner's execution was scheduled for March 31, 1982. Petitioner filed a petition for writ of habeas corpus with the Florida Supreme Court on March 23, 1982 and on March 25, 1982 the Florida Supreme Court granted the writ and remanded for a new trial. That opinion is contained in Appendix at pages 5a-6a. On September 14, 1982, the Florida Supreme Court rendered its opinion on rehearing, vacating the opinion of March 25, 1982 and denying a new trial, which opinion is set out in the Appendix at pages 20a-25a. Petitioner timely filed a motion for rehearing which was denied by order dated December 16, 1982, a copy of which is set out in the Appendix at page 7a.

REASONS FOR GRANTING THE WRIT

I.

THE OMISSION OF AN INSTRUCTION REGARDING THE PRESUMPTION OF INNOCENCE, THE EXTRAORDINARY BURDEN OF PROOF AND THE ELEMENTS OF THE CRIME AS TO THE UNDERLYING FELONY IN A FELONY MURDER PROSECUTION CREATES THE DANGER THAT THE JURORS FAILED TO MAKE ESSENTIAL FACTUAL DETERMINATIONS AS REQUIRED BY IN RE WINSHIP, 397 U.S. 358 (1970).

The concept "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged" is well established. In re Winship, 397 U.S. 358 (1970) at 364. This concept recognizes that a jury needs proper guidance and instructions as to the legal standards they must apply. The importance of adequate standards and safeguards regarding the presumption of innocence and burden of proof has long been recognized. In Taylor v. Kentucky, 436 U.S. 478 (1978), this Court recognized that the ordinary citizen may draw significant additional guidance from an instruction on the presumption of innocence. This Court has reiterated that if the overall fairness of a trial when considered in its entirety is affected by the failure to give an instruction on the presumption of innocence that constitutional error results. Kentucky v. Whorton, 441 U.S. 786 (1979). The reasonable doubt standard has further been recognized as playing a vital role in the American scheme of criminal procedure. This Court has stated:

> It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence - that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law. Coffin v. United States, 156 U.S. 432 (1895).

Further, this Court has noted the cogent reasons for the reasonable doubt standard because the accused has at stake interests of immense importance - mainly loss of liberty and certainty of being stigmatized by conviction. In Petitioner's

situation, not only does he face loss of liberty and society's stigma, he also faces execution.)

Petitioner was charged with two counts of first degree murder, one charging premeditation and one charging felony/murder by rape. On the premeditation charge, the jury was instructed that the Petitioner was presumed innocent of the murder charge and that the prosecution had the burden of proving the charge beyond a reasonable doubt. As to the premeditation element of the crime, the jury likewise received extensive and detailed instruction (R-828,829). Petitioner was acquitted of the premeditation charge.

On the felony murder charge the jury was likewise instructed that the Petitioner was presumed innocent of the murder. The jury was never instructed that the Petitioner was presumed innocent of the rape charge. The jury was never instructed that the prosecution had a burden of proving the elements of the rape charge beyond a reasonable doubt. The jury was never even instructed by the court on what the elements of rape were under Florida law.[2] The law clearly recognizes that the jury is to be instructed on the elements of the underlying felony. Robles v. State, 188 So.2d 789 (Fla. 1966).[3]

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[2]The only time the jury came close to hearing what the elements of rape were was when the felony murder count in the indictment was read to them. Of course, the jury was never told by the court that the indictment contained the elements of rape but was expressly told by the court that they would be informed of the elements at a later time (R-341). [The prosecutor also told the jury they would be instructed on the specific elements at the close (R-351)]. Further, the jury was repeatedly told by the court, the prosecutor and the defense attorney that the purpose of the indictment was to get the petitioner into the court and for that alone (R-344,348,355). Also, Federal courts have long recognized that an indictment alone is insufficient to adequately instruct a jury. U.S. vs. Noble, 155 F.2d 315 (3rd Cir. 1946); Morris vs. U.S., 156 F.2d 525 (9th Cir. 1946); and U.S. vs. Pincourt, 159 F.2d 919 (3rd Cir. 1947).

[3]Failure to properly instruct on the underlying felony and to define the underlying felony constitutes fundamental error. Robles, supra; Franklin v. State, 403 So.2d 975 (Fla. 1981).

The court, having previously indicated to the jury that it would be instructed on the elements, omitted the elements from its instruction to the jury. The written instruction provided to the jury shows the omission since the court omitted this paragraph:

> The crime of (name crime applicable to evidence) defined as follows: (define other felony).

and by omitting this paragraph failed to name the crime applicable to the evidence and most importantly failed to define the felony involved (R-830,831).[4]

Whether this omission was intentional or unintentional is unknown but what is known is that the jury was never instructed on the elements which constitute rape, they were never informed that the defendant was presumed innocent of the underlying felony and they were never told the charge of rape had to be proved beyond a reasonable doubt before they could convict on the felony murder charge. This failure results in a conviction.

This action by the court amounts to a misstatement of the law rather than a mere omission, and as such so infected the entire trial that the resulting conviction violates due process. Henderson vs. Kibbe, 431 U.S. 145 (1976); Cupp vs. Naughten, 414 U.S. 141 (1973). The poisoning of the trial and resulting due process violation is certainly brought home by the fact that as to the Count I - premeditation - the jury is properly instructed and premeditation is defined in detail and an acquittal occurs, while as to Count II - felony murder - the jury is not adequately instructed and the felony/murder requirements are never defined and the Petitioner is convicted and sentenced to death.

The principles expressed by this Court in In re Winship, Taylor vs. Kentucky, and Kentucky vs. Whorton, supra,

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[4] The failure to instruct on the elements of rape in the Petitioner's case is of particular significance since the sexual act may have occurred after death (R-519), and if so, would not be a rape under Florida law.

are basic to the foundation of our criminal law and this Court needs to make clear that these very princples apply in a felony murder situation and that the failure to apply these principles results in a conviction that violates due process.

CONCLUSION

For the reasons expressed herein, the Petitioner respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

AKERSON, SWISHER, DILLINGER & BRETT

By _____

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tion of undue influence arose. This presumption placed upon the defendants the burden of providing a reasonable explanation of the gift.

In an attempt to carry this burden, Mr. Cripe explained that Mrs. Hare agreed to deposit the money in a joint account because he had handled the condemnation transaction and knew more about it than she did. There was no evidence, however, that Mr. Cripe provided anything more than routine administrative services in connection with the compensation award, services which he was already obligated to perform as Mrs. Hare's property manager. In return for some relatively insignificant paperwork, the Cripes received a sum of money out of all proportion to the services provided.

[9] Petitioners argue that there was insufficient proof of active procurement with regard to the deposit of the condemnation proceeds into a joint account. There was evidence, however, that Mrs. Hare's mental condition had deteriorated and she had become totally dependent on the Cripes. Where there is such inequality of mental strength, active procurement can be shown by evidence, as there was here, of a request or suggestion by the dominant party.

[10] Therefore with regard to the condemnation funds, the district court was correct in finding undue influence from the evidence, and such finding did not constitute substituting its judgment for that of the trier of fact. The trial court's denial of relief to the plaintiff with regard to the condemnation funds was not supported by the evidence. The evidence showed a confidential relationship existed in 1969, and Mr. Cripe obtained survivorship rights to a large sum of money by affirmative request or suggestion. These facts raised a presumption of undue influence, which the Cripes had to rebut in order to prevent a finding of undue influence based on the presumption. They did not carry this burden. Since the facts therefore showed undue influence, the trial court should have awarded the $32,000 certificate of deposit to the [illegible] pursuant to section 659.25(2), Florida Statutes (1979).

The decision of the district court of appeal reversing the trial court with regard to the two joint accounts, referred to in the district court's opinion as containing $12,700 and $10,900 respectively, was in error and should be quashed. That portion of the district court's decision that reversed the trial court with regard to the $32,000 certificate of deposit, derived from a condemnation settlement, was correct and should be approved.

Accordingly, the decision of the district court is quashed in part and approved in part.

It is so ordered.

ALDERMAN, C.J., and OVERTON, SUNDBERG and McDONALD, JJ., concur.

ADKINS, J., concurs in part and dissents in part with an opinion.

ADKINS, Justice, concurring in part and dissenting in part.

I would quash the decision of the District Court of Appeal and remand with instructions to affirm the judgment of the trial court.

James Curtis McCRAE, Petitioner,

v.

Louie L. WAINWRIGHT, Respondent.

No. 61865.

Supreme Court of Florida.

Sept. 14, 1982.

Rehearing Denied Dec. 16, 1982.

Proceeding was instituted on a petition for writ of habeas corpus and a stay of execution. The Supreme Court held that

(1) failure to instruct jury on elements the underlying felony, rape, in prosecuti for felony-murder was not fundamental (ror mandating reversal where the tr court did announce to the jury the speci language which was contained in the fe ny-murder count of the indictment a which alleged that the defendant did u lawfully and feloniously effect the death the victim in perpetrating or attempting perpetrate a rape; (2) petitioner's appella counsel did not render ineffective assistan by failing to raise fundamental error (appeal; and (3) allegations of receipt a consideration of nonrecord information co cerning appellants in pending capital a peals, even if true, did not establish err which would entitle petitioner to habe corpus relief.

Petition denied.

Overton, Sundberg and McDonald, JJ dissented.

1. **Criminal Law ⇐1038.2**

Failure to instruct jury on elements (the underlying felony, rape, in prosecutio for felony-murder was not fundamental e ror mandating reversal where the tri court did announce to the jury the specifi language which was contained in the felo ny-murder count of the indictment an which alleged that the defendant did ur lawfully and feloniously effect the death o the victim in perpetrating or attempting t perpetrate a rape.

2. **Criminal Law ⇐641.13(7)**

Since there was no fundamental erro which would have mandated reversal of ap peal, petitioner's appellate counsel did no render ineffective assistance by failing t raise the fundamental error on appeal U.S.C.A.Const.Amend. 6.

3. **Habeas Corpus ⇐25.1(4)**

Allegations of receipt and consideratior of nonrecord information concerning appel lants in capital appeals during time wher petitioner's appeal was pending, even if true, did not establish error which would entitle petitioner to habeas corpus relief.

(1) failure to instruct jury on elements of the underlying felony, rape, in prosecution for felony-murder was not fundamental error mandating reversal where the trial court did announce to the jury the specific language which was contained in the felony-murder count of the indictment and which alleged that the defendant did unlawfully and feloniously effect the death of the victim in perpetrating or attempting to perpetrate a rape; (2) petitioner's appellate counsel did not render ineffective assistance by failing to raise fundamental error on appeal; and (3) allegations of receipt and consideration of nonrecord information concerning appellants in pending capital appeals, even if true, did not establish error which would entitle petitioner to habeas corpus relief.

Petition denied.

Overton, Sundberg and McDonald, JJ., dissented.

1. Criminal Law ⇐1038.2

Failure to instruct jury on elements of the underlying felony, rape, in prosecution for felony-murder was not fundamental error mandating reversal where the trial court did announce to the jury the specific language which was contained in the felony-murder count of the indictment and which alleged that the defendant did unlawfully and feloniously effect the death of the victim in perpetrating or attempting to perpetrate a rape.

2. Criminal Law ⇐641.13(7)

Since there was no fundamental error which would have mandated reversal of appeal, petitioner's appellate counsel did not render ineffective assistance by failing to raise the fundamental error on appeal. U.S.C.A.Const.Amend. 6.

3. Habeas Corpus ⇐25.1(4)

Allegations of receipt and consideration of nonrecord information concerning appellants in capital appeals during time when petitioner's appeal was pending, even if true, did not establish error which would entitle petitioner to habeas corpus relief.

Robert H. Dillinger of Stolba, Lumley & Dillinger, St. Petersburg, for petitioner.

Jim Smith, Atty. Gen. and Robert J. Landry, Asst. Atty. Gen., Tampa, for respondent.

PER CURIAM.

This cause is before the Court on McCrae's petition for a writ of habeas corpus and a stay of execution. Petitioner is now imprisoned under sentence of death pursuant to judgment and sentence affirmed by this Court in *McCrae v. State*, 395 So.2d 1145 (Fla.), *cert. denied*, — U.S. —, 102 S.Ct. 583, 70 L.Ed.2d 486 (1981). Petitioner raises three issues going to the legality of his judgment and sentence. The asserted grounds for relief are: (1) that the trial court committed fundamental error by not fully instructing the jury on the elements of the underlying felony in this felony murder case, (2) that petitioner's appellate counsel was ineffective in that he did not raise the asserted fundamental error on appeal, and (3) that this Court violated petitioner's rights by receiving non-record information concerning appellants in pending capital appeals.

Petitioner was charged with first-degree murder. The indictment was in two counts (though there was but one homicide), one charging premeditated murder and the other felony murder. The first count of the indictment read as follows:

> [O]ne JAMES CURTIS McCRAE did unlawfully, feloniously and from a premeditated design to effect the death of one MARGARET MEARS, did strike, beat, bruise and wound the said MARGARET MEARS, thus and thereby inflicting on and upon the head or body of the said MARGARET MEARS certain mortal wounds of which said mortal wounds the said MARGARET MEARS did between October 13, 1973 and October 15, 1973 die; contrary to the statute in such case made and provided and against the peace and dignity of the State of Florida.

The second count, charging felony murder, was worded as follows:

[O]ne JAMES CURTIS McCRAE did unlawfully and feloniously effect the death of MARGARET MEARS in perpetrating or attempting to perpetrate a rape, to-wit: did unlawfully and feloniously ravish and carnally know a female of more than ten (10) years of age, to-wit: MARGARET MEARS by force and against her will, contrary to the statute in such case made and provided and against the peace and dignity of the State of Florida.

For the count charging petitioner with premeditated murder, the court instructed the jury in accordance with the standard jury instructions. With regard to the second count, charging felony murder, the court gave the following general felony murder instruction:

The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree even though there is no premeditated design or intent to kill.

If a person kills another while he is trying to do or commit any arson, rape, robbery, burglary, the abominable detestable crime against nature or kidnapping, or while escaping from the immediate scene of such crime the killing is in the perpetration or in the attempt to perpetrate such arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping and is murder in the first degree.

The instructions to the jury also included a reading of the indictment as set out above. The indictment was given to the jury, along with the forms for the verdict, to take with it into deliberations. The second count of the indictment, charging felony murder, specified the underlying felony and defined it in terms of its essential elements.

The trial court, in instructing the jury on the form of the verdict, advised that the jury could return a verdict as to the two counts collectively or individually. The court provided separate verdict forms for verdicts of (1) not guilty, (2) guilty on both count one and count two, (3) guilty on count one, (4) guilty on count two, and (5) guilty of lesser included offenses. The jury returned a verdict finding petitioner guilty as charged in count two, the felony murder count. The other verdict forms were left blank.

Petitioner argues that under *State v. Jones*, 377 So.2d 1163 (Fla.1979), and *Robles v. State*, 188 So.2d 789 (Fla.1966), the trial court erred fundamentally in not instructing the jury on the elements of the underlying felony. *Robles* and *Jones* are based on the principle that a jury cannot properly find a defendant guilty of felony murder without knowing precisely what conduct constitutes the underlying felony. We find that the instruction was adequate and there was no fundamental error.

In *Vasil v. State*, 374 So.2d 465 (Fla.1979), the defendant was charged with felony murder involving the crime of rape. On appeal, Vasil argued that the court had erred in failing to fully define the underlying felony of rape. The court charged the jury on felony murder and rape as follows:

If a person kills another in trying to do or commit any rape, or while escaping from the immediate scene of such crime, the killing is in perpetration of or in the attempt to perpetrate such crime.

It is the crime of rape to ravish or carnally know a female person of the age of eleven years or more by force and against her will.

In appealing his conviction to this Court the defendant argued that the above definition was not sufficient to inform the jury of the elements of the underlying felony of rape. In response to that argument the Court held that:

The trial court, in instructing the jury on the underlying felony, recited all of the elements of the crime of rape. It is not necessary to instruct on the elements of the underlying felony with the same particularity that would be required if that offense were the primary crime charged. *See Robles v. State*, 188 So.2d 789 (Fla.1966). The underlying felony was

The same principle appli

[1] In the instant ca failed to include an inst ments of rape in its char did announce to the jur guage contained in the s indictment. As in *Vasil*, prised of the essential el derlying felony. Therefo complied substantially *Jones*.

[2] Since there was n ror which would have ma appeal, petitioner's secon his appellate counsel re assistance by failing to ra tal error on appeal—is al Under the standards ann *v. State*, 394 So.2d 997 (Fl has failed to establish ine of counsel.

[3] As his third groun pus relief, petitioner asser requested and received e tion concerning appellants during the time when his ing here. We considered argument in *Brown v.* So.2d 1327 (Fla.), *cert.* ——, 102 S.Ct. 542, 70 L. There we held that the cript and consideration of by appellate judges, even establish error which woul tioners to habeas corpus r

Having determined that entitled to habeas corpus r petition.

It is so ordered.

ALDERMAN, C.J., and and EHRLICH, JJ., concu

OVERTON, SUNDBE DONALD, JJ., dissent.

789 (Fla.1966). The instruction on the underlying felony was adequate.

The same principle applies here.

[1] In the instant case, the trial court failed to include an instruction on the elements of rape in its charge to the jury, but did announce to the jury the specific language contained in the second count of the indictment. As in *Vasil*, the jury was apprised of the essential elements of the underlying felony. Therefore the trial court complied substantially with *Robles* and *Jones*.

[2] Since there was no fundamental error which would have mandated reversal on appeal, petitioner's second contention—that his appellate counsel rendered ineffective assistance by failing to raise the fundamental error on appeal—is also without merit. Under the standards announced in *Knight v. State*, 394 So.2d 997 (Fla.1981), petitioner has failed to establish ineffective assistance of counsel.

[3] As his third ground for habeas corpus relief, petitioner asserts that this Court requested and received *ex parte* information concerning appellants in capital appeals during the time when his appeal was pending here. We considered and rejected this argument in *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), *cert. denied*, — U.S. —, 102 S.Ct. 142, 70 L.Ed.2d 407 (1981). There we held that the allegations of receipt and consideration of such information by appellate judges, even if true, did not establish error which would entitle the petitioners to habeas corpus relief.

Having determined that petitioner is not entitled to habeas corpus relief we deny the petition.

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD and EHRLICH, JJ., concur.

OVERTON, SUNDBERG and McDONALD, JJ., dissent.

Ronald STRAIGHT, Petitioner,

v.

Louie L. WAINWRIGHT, Respondent.

Ronald STRAIGHT, Appellant,

v.

STATE of Florida, Appellee.

Nos. 62168, 62182.

Supreme Court of Florida.

Sept. 14, 1982.

Rehearing Denied Dec. 27, 1982.

Defendant was convicted of murder in first degree and was sentenced to death, and judgment and sentence were affirmed on appeal. Defendant then moved trial court for order vacating, setting aside, or correcting judgment and sentence. The Circuit Court, Duval County, Thomas D. Oakley, J., denied motion, and defendant appealed. Defendant also filed petition for writ of habeas corpus in Supreme Court, which was consolidated with appeal from trial court's denial of postconviction relief. The Supreme Court held that: (1) that defendant's appellate counsel did not argue that trial court had expressly restricted jury to consideration of statutory mitigating circumstances did not deprive defendant of full and meaningful appeal; (2) that appellate counsel did not argue that trial judge improperly considered opinions of officers familiar with case on propriety of death penalty did not deprive defendant of full and meaningful appeal; (3) failure of defendant's trial counsel to determine prospective jurors' attitudes toward capital punishment did not justify postconviction relief; (4) fact that trial counsel did not immediately object to prosecutor's repeated references, during jury selection, to immunity granted coconspirator and state witness did not justify postconviction relief; and (5) trial counsel's failure to object to

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Criminal Law—Habeas Corpus—Stay of Execution Granted—Felony Murder—Failure to Instruct Jury on Elements of Underlying Felony Fundamental Error Where Defendant Found Guilty of Felony Murder But Not Premeditated Murder—Ineffective Assistance of Appellate Counsel Resulting From Failure to Raise Issue of Improper Jury Instruction

JAMES CURTIS McCRAE, Petitioner, v. LOUIE L. WAINWRIGHT, Respondent. Supreme Court of Florida. Case No. 61,665. March 25, 1982. Original Proceeding—Habeas Corpus.
Robert H. Dillinger of Stolba, Lumley and Dillinger, St. Petersburg, Florida, for Petitioner. Jim Smith, Attorney General, and Robert J. Landry, Assistant Attorney General, Tampa, Florida, for Respondent.

(PER CURIAM.) Petitioner, James Curtis McCrae, seeks a stay of execution and relief by writ of habeas corpus from his conviction and sentence, affirmed by this Court in McCrae v. State, 395 So.2d 1145 (Fla.), cert. denied, 102 S.Ct. 583 (1981). Petitioner asserts that his original appellate counsel was ineffective for failure to raise a fundamental error in the trial proceedings which, if presented, would have mandated a reversal of his conviction. We agree that the trial court committed clear fundamental error in failing to properly instruct the jury and that appellate defense counsel's failure to raise that issue establishes ineffective assistance of counsel under the standards we set forth in Knight v. State, 394 So.2d 997 (Fla. 1981). We find that we must therefore grant the writ of habeas corpus, grant the stay of execution, vacate our prior opinion, and remand to the trial court for a new trial.

The relevant facts to the issue presented are uncontroverted and reflect that petitioner was charged with first degree murder in a two count indictment. The first count charged petitioner with first degree premeditated murder:

> [O]n JAMES CURTIS McCRAE did unlawfully, feloniously and from a premeditated design to effect the death of one MARGARET MEARS, did strike, beat, bruise and wound the said MARGARET MEARS, thus and thereby inflicting on and upon the head or body of the said MARGARET MEARS certain mortal wounds of which said mortal wounds the said MARGARET MEARS did between October 13, 1973 and October 15, 1973 die; contrary to the statute in such case made and provided and against the peace and dignity of the State of Florida.

The second count charged petitioner with felony murder:

> [O]n JAMES CURTIS McCRAE did unlawfully and feloniously effect the death of MARGARET MEARS in perpetrating or attempting to perpetrate a rape, to-wit: did unlawfully and feloniously ravish and carnally know a female of more than ten (10) years of age, to-wit: MARGARET MEARS by force and against her will, contrary to the statute in such case made and provided and against the peace and dignity of the State of Florida.

The trial judge instructed the jury in accordance with the standard jury instructions for count one, premeditated murder. As to count two, however, the trial court gave only the following general felony murder instruction:

> The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree even though there is no premeditated design or intent to kill.
>
> If a person kills another while he is trying to do or commit any arson, rape, robbery, burglary, the abominable detestable crime against nature or kidnapping, or while escaping from the immediate scene of such crime the killing is in the perpetration or in the attempt to perpetrate such arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping and is murder in the first degree.

This was the total instruction on felony murder. There was no identification of the specific underlying felony for which the defendant was charged nor was there any instruction whatever on the elements of the charged underlying felony.

The trial court, in instructing the jury on the form of the verdict, advised the jury that it could return a verdict as to the counts collectively or individually and gave them separate verdict forms which, provided, respectively, for a verdict of (1) not guilty, (2) guilty as charged in counts one and two of the indictment, (3) guilty as charged in count one of the indictment, (4) guilty as charged in count two of the indictment, and (5) guilty of lesser included offenses. The jury returned a verdict finding petitioner guilty as charged of count two, the felony murder charge. The verdict form for "guilty as charged in count one" and the form for "guilty as charged in counts one and two," as they appear in the record before this Court, were not used and are blank. The record clearly demonstrates that the trial judge

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ailed to properly instruct the jury on the elements of the harged underlying felony. The only mention of the underlying elony was by the judge reading the indictment to the jurors t the commencement of the instructions. The jury returned a erdict finding petitioner guilty of felony murder and rejected, y its action, a verdict finding petitioner guilty of premeditated irst degree murder.

In 1966, in Robles v. State, 188 So.2d 789 (Fla. 1966), his Court held that a trial court was obligated to instruct the ury on the elements of an underlying felony in order to con- ict a defendant under the felony murder rule. The requirement o so instruct applied whether or not defense counsel so equested. In State v. Jones, 377 So.2d 1163 (Fla. 1979), this ourt reaffirmed our holding in Robles, finding the trial court's ailure to give an instruction on the elements of the underlying elony, where felony murder was the primary offense charged nd argued to the jury, was fundamental error. To reject peti- oner's claim in this case would require that this Court over- ule its prior decisions in Robles and Jones which clearly and nambiguously mandate a trial judge to instruct the jury on he elements of the underlying felony when felony murder is the rimary offense for which defendant is charged. The dictates of Robles and Jones must control. Accord Franklin v. State, 403 o.2d 975 (Fla. 1981). Our decisions in Adams v. State, No. 6,134 (Fla. February 11, 1982) [7 FLW 75], Knight v. State, 94 So.2d 997 (Fla. 1981), and Frazier v. State, 107 So.2d 16 Fla. 1958), as they concern instructions on an underlying elony are inapplicable because in each of those cases there as a premeditated murder charge, a verdict for both pre- editated murder and felony murder, and sufficient evidence to ustain a conviction on the charge of premeditated murder. An mportant distinction was that there was a valid verdict for pre- editated murder, albeit a collective verdict. That is not the ituation in the instant case.

Addressing the issue of ineffective assistance of counsel, we ind that the failure to raise this issue on appeal meets the three- ronged test we set out in Knight v. State, concerning ineffective ssistance of counsel. First, petitioner has set forth the specific mission of his appellate counsel. Second, the deficiency was ritical because our own case law had made the matter funda- ental error. Third, the deficiency of failure to raise the issue emonstrates prejudice because, if it had been properly raised, t would, under the instant record and the law of this state at he time of the petition for review, have required a reversal nd a new trial.

We find that we have no alternative but to conclude appellate ounsel failed to provide reasonably effective assistance to peti- ioner in the original appeal on the merits. We grant the writ of abeas corpus, grant the stay of execution, recall our mandate ssued in accordance with our opinion in McCrae v. State, 395 o.2d 1145 (1981), vacate that opinion, and remand this ause to the trial court for a new trial on count two of the riginal indictment. With our holding, we find it unnecessary to nsider petitioner's remaining points.

It is so ordered. (Sundberg, C.J., Overton, McDonald, and shbick, JJ., Concur. Boyd, J., Dissents with an opinion, in hich Adkins and Alderman, JJ., Concur.)

BOYD, J., dissenting.

I respectfully dissent to the majority opinion.

The majority opinion, in staying the execution, reversing he conviction, and requiring a new trial for the defendant is ased upon decisions of this Court cited therein which hold that to support a conviction of murder in the first degree based upon felony murder it is necessary for the court to charge the jury on the elements of the underlying felonies.

The record in this case reflects that the court read the grand jury indictment for felony murder as follows:

> [O]ne JAMES CURTIS McCRAE did unlawfully and feloniously effect the death of MARGARET MEARS in perpetrating or attempting to perpetrate a rape, to-wit: did unlawfully and feloniously ravish and carnally know a female of more than ten (10) years of age, to-wit: MARGARET MEARS by force and against her will, contrary to the statute in such case made and provided and against the peace and dignity of the State of Florida.

The basis upon which Robles, Jones, and other authority is based is that a jury cannot properly find a person guilty of committing first degree murder based upon a felony without knowing exactly what conduct constitutes the underlying felony.

In the case of Vasil v. State, 374 So.2d 465 (Fla. 1979), the defendant was charged with felony murder involving the crime of rape. On appeal, Vasil argued that the court had erred in failing to fully define the underlying felony of rape. The court charged the jury on felony murder and rape as follows:

> If a person kills another in trying to do or commit any rape, or while escaping from the immediate scene of such crime, the killing is in perpetration of or in the attempt to perpetrate such crime.
>
> It is the crime of rape to ravish or carnally know a female person of the age of eleven years or more by force and against her will.

In appealing his conviction to this Court the defendant argued that the above definition was not sufficient to inform the jury of the elements of the underlying felony of rape. In response to that argument the Court held that:

> The trial court, in instructing the jury on the underlying felony, recited all of the elements of the crime of rape. It is not necessary to instruct on the elements of the underlying felony with the same particularity that would be required if that offense were the primary crime charged. See Robles v. State, 188 So.2d 789 (Fla. 1966). The instruction on the underlying felony was adequate.

In this case the court failed to define the crime of rape in its charge to the jury but, as stated in the majority opinion, the court did announce to the jury the specific language contained in the second count of the grand jury indictment charging the defendant with felony murder based upon rape. I agree with those cases cited in the majority opinion requiring that juries be told the elements of the underlying felonies, but in this case, as in Vasil, the court complied substantially with the requirement of Robles and Jones by informing the jury of the elements of rape.

Therefore, I respectfully dissent. (Adkins and Alderman, JJ., Concur.)

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IN THE SUPREME COURT OF FLORIDA

THURSDAY, DECEMBER 16, 1982

JAMES CURTIS McCRAE,	**	
Petitioner,	**	
vs.	**	CASE NO. 61,865
LOUIE L. WAINWRIGHT,	**	
Respondent.	**	

On consideration of the motion for rehearing filed by attorney for petitioner,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Deputy Clerk

cc: Hon. Sal Geraci, Clerk

Robert H. Dillinger, Esquire
Robert J. Landry, Esquire
Investigator Ed Boone,
Office of the State Attorney

James Curtis McCRAE, Appellant,

v.

STATE of Florida, Appellee.

No. 45894.

Supreme Court of Florida.

Oct. 30, 1980.

On Rehearing April 9, 1981.

Defendant was convicted in the Circuit Court, Lee County, William Lamar Rose, J., of first-degree murder, and he appealed. The Supreme Court held that (1) State was properly allowed to question defendant about prior unrelated felony on cross examination; (2) testimony of witnesses, which described an individual closely resembling defendant who, two days prior to date on which murder victim's body was found, was in immediate area where crime was committed at approximate time of its commission, was relevant and admissible as to issue of identity; (3) defendant was not denied due process and equal protection of law when he was charged under first degree murder statute rather than second degree murder statute; and (4) jury's recommendation that defendant should be sentenced to life imprisonment had no reasonable basis under circumstances of case, and thus trial court properly imposed death sentence over jury recommendation of life.

Affirmed.

Sundberg, C. J., concurred specially in result and filed opinion.

1. Criminal Law ⇐998(6)

Denial of defendant's motion to vacate judgment and sentence, based upon assertion by material witness that he testified falsely at trial due to coercion and promise of "deal" by state officials, was proper, in that no *Brady* violation had occurred.

2. Witnesses ⇐269(1)

On cross-examination, state must, as general rule, limit itself to questions no broader in scope than those propounded by defense.

3. Witnesses ⇐350

State did not exceed scope of permissible inquiry on cross-examination when it sought to elicit nature of defendant's prior unrelated felony to which defendant referred on direct, in that state was entitled to negate delusive innuendos of defendant's counsel, which tactfully attempted to mislead jury into believing that defendant's prior felony was inconsequential.

4. Witnesses ⇐269(1)

Rule limiting inquiry on cross examination to general facts which have been stated in direct examination must not be so construed as to defeat real objects of cross-examination, one of which is to elicit whole truth of transactions which are only partly explained in direct examination; hence, questions which are intended to fill up designed or accidental omissions of witness, or to call out facts tending to contradict, explain or modify some inference which might otherwise be drawn from his testimony, are legitimate cross examination.

5. Criminal Law ⇐1137(2)

Defendant cannot take advantage on appeal of situation which he has created at trial.

6. Criminal Law ⇐337

Any testimony relevant to prove fact in issue is admissible unless precluded by some specific rule of exclusion.

7. Criminal Law ⇐369.2(1)

Relevant evidence will not be excluded merely because it points to commission of separate crime, unless its sole relevance is to point up bad character or criminal propensity of accused.

8. Criminal Law ⇐339.5

Testimony of two witnesses, which described individual closely resembling de-

fendant who, two days before murder victim's body was found, was in immediate area where crime was committed at approximate time of its commission, was relevant and admissible as to issue of identity; failure of witnesses to identify defendant was question for jury as to weight to be accorded their testimony.

9. Criminal Law ⇐272(14)

Testimony of witness, who described incident in which defendant came to her apartment, searching for particular individual, and later returned to apartment, forced door open, shot acquaintance of witness, and then beat witness about face with gun and choked her before fleeing, was admissible in prosecution for murder because witness was able to identify defendant and because, allegedly, she established that common plan or scheme was employed by defendant to gain admittance to victims' homes.

10. Constitutional Law ⇐250.2(1), 265

Defendant was not denied due process and equal protection of law when he was charged under first degree murder statute, which proscribes unlawful killing of human being when perpetrated from premeditated design or when committed by person engaged in perpetration of crime, rather than under second degree murder statute, which proscribes unlawful killing of human being when perpetrated by act imminently dangerous to another and evincing depraved mind regardless of human life. West's F.S.A. § 782.04(1)(a), (2); U.S.C.A.Const. Amends. 5, 14.

11. Criminal Law ⇐1213

Sentencing procedure of statute providing sentence of death or life imprisonment for capital felonies was neither violative of constitutional mandate of *Furman v. Georgia* on its face or as applied to defendant, who was convicted of first degree murder. West's F.S.A. § 921.141 et seq.

12. Homicide ⇐354

In overruling advisory verdict of jury for life sentence and sentencing defendant, who was convicted of first degree murder, to death, finding by trial court that crime was committed while defendant was engaged in commission of rape, an aggravating circumstance, was not error. West's F.S.A. § 921.141(5)(d).

13. Homicide ⇐354

In overruling advisory verdict of jury for life sentence and sentencing defendant, who was convicted of first degree murder, to death, trial court correctly determined that crime was especially heinous, atrocious or cruel, an aggravating circumstance. West's F.S.A. § 921.141(5)(h).

14. Criminal Law ⇐1208(1)

Statute providing that fact that capital felony was especially heinous, atrocious, or cruel is an aggravating circumstance to be considered by trial court in determining whether to impose sentence of life imprisonment or death applies to conscienceless or pitiless crime which is unnecessarily torturous to victim. West's F.S.A. § 921.141(5)(h).

15. Homicide ⇐354

Where defendant, who was convicted of first degree murder, had pled guilty to prior felony involving use or threat of violence to person, defendant's guilty plea constituted conviction, even though judge had not adjudicated him guilty, and could be considered as aggravating circumstance in trial court's decision whether to impose sentence of life imprisonment or death. West's F.S.A. § 921.141(5)(b).

16. Criminal Law ⇐273.2(2)

Once plea of guilty has been accepted by court, it is the conviction and only remaining step is formal entry of judgment and imposition of sentence.

17. Criminal Law ⇐1208(1)

In determining whether death penalty should be imposed, court must consider various circumstances set forth in statute governing sentencing for capital felonies, which

and judge in establishing overall character analysis of defendant so that he may properly determine appropriate sentence within limits set forth in law. West's F.S.A. § 921.141.

18. Criminal Law ⇐1208(1)

Word "convicted" as used in section providing that previous conviction of defendant of another capital felony or a felony involving use or threat of violence to person is aggravating circumstance to be considered by trial court in determining whether to impose sentence of life imprisonment or death for capital felony means valid guilty plea or jury verdict of guilty for violent felony; an adjudication of guilt is not necessary for such a "conviction" to be considered in capital sentencing character analysis. West's F.S.A. § 921.141(5)(b).

See publication Words and Phrases for other judicial constructions and definitions.

19. Homicide ⇐354

Trial court properly rejected argument of defendant, who was convicted of first degree murder, that he was under influence of extreme mental or emotional disturbance at time crimes were committed and that such should be considered as mitigating circumstance in determining whether to impose sentence of life imprisonment or death. West's F.S.A. § 921.141(6)(b).

20. Criminal Law ⇐885

Advisory recommendation of jury on sentence to be imposed on defendant must be accorded great weight.

21. Criminal Law ⇐885

Jury's recommendation that defendant, who was convicted of first degree murder, should be sentenced to life imprisonment had no reasonable basis under circumstances of case, and thus trial court's decision to impose death sentence over jury recommendation was proper. West's F.S.A. § 921.141.

On Motion for Rehearing

22. Criminal Law ⇐996(17)

Upon review of record of postconviction relief proceeding in light of assertions made in brief of defendant, who alleged that witness committed perjury during murder prosecution, evidence was sufficient to affirm finding of trial court that witness' testimony at trial was true and that testimony at postconviction hearing was false.

Philip M. Gerson of Frankman, Gerson & Frankman, Miami, for appellant.

Jim Smith, Atty. Gen., and Raymond L. Marky, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

This is a direct appeal from a conviction of murder in the first degree and a sentence of death rendered in the circuit court for Lee County, Florida. We have jurisdiction pursuant to article V, section 3(b)(1), Florida Constitution, and affirm the conviction and sentence.

On October 15, 1973, Margaret Mears, a sixty seven year-old woman, was found dead in her apartment. Her body, unclothed from the waist down, had been brutally beaten about the head and chest, and her vaginal area was covered with blood. A bloody palm print lifted from her apartment was identified as that of the appellant, James Curtis McCrae. McCrae was subsequently indicted for two counts of murder in the first degree, one count charging a premeditated killing, and the other charging felony murder.

In order to determine his competency to stand trial, appellant was examined by three court appointed psychiatrists. While all three doctors concluded that appellant's mental disorders created violent and uncontrolled behavior, appellant was found competent to stand trial. Specifically, Dr. Mordecai Haber observed that McCrae suffered from a disorder which contributed to an explosive personality. The doctor concluded that McCrae was mentally competent but too dangerous to be at liberty in society. Dr. Thomas Haagland found that McCrae

was capable of giving aid to his counsel and, when sober, was a well-contained individual who had firm control over his faculties. However, when under the influence of intoxicants, appellant released an underlying epileptic furor which erupted into uncontrolled violent behavior. Dr. Clarence Schlit, who testified during the bifurcated phase of the trial, stated that McCrae was subject to attacks when under emotional stress which prevented him from exercising the restraint which would be present in a normal individual. Although the doctor stated that appellant was not insane, he did determine that McCrae suffered from a chronic schizophrenic illness and that he was unlikely to cooperate with defense counsel.

At trial, the state introduced the testimony of four witnesses for the alleged purpose of showing identity or establishing a common scheme or plan. Edith Veal testified that she lived near the victim. At the purported hour of the crime's commission, she stated that a young black male with a cast on his arm fitting the same general description as appellant, knocked on her door and asked for Wayne Miller. Mrs. Veal stated that no one by that name lived at her residence. The man then asked if her husband was home. While Mrs. Veal was unable to identify appellant at a pretrial lineup, she was able positively to identify him upon being recalled to the witness stand.

Muriel Bergner similarly testified that she lived in close proximity to the victim. According to her testimony, on October 14, 1973, the day before the victim's body was found, a young black male also fitting McCrae's general description approached her while she was walking her dog, to ask directions. The man walked away, but returned, again asking questions. At that point, Mrs. Bergner walked hurriedly to her home and locked the door. She succeeded in fastening the lock just before the man arrived at her doorstep. The state also called Dorothy Hendley who testified that while walking her dog, a man whom she positively identified as appellant approached her and asked questions similar to those asked of Muriel Bergner.

Faith Lederman Gertner and William Smith testified that McCrae came to Mrs. Gertner's apartment on June 8, 1973, searching for Randy Williams. When informed that Williams did not live there, McCrae left but returned shortly thereafter, and asked Mrs. Gertner to accompany him downstairs. She refused, but William Smith agreed to go in her place. Once they walked downstairs, McCrae took a swing at Smith and fled. Later that evening, appellant returned and forced the door open. He drew a gun and shot Smith. He then beat Mrs. Gertner about the face with the gun and choked her before fleeing again.

After the state rested, appellant took the stand in his own behalf. During direct examination, he was asked if he had been convicted of misdemeanors and if he had pleaded guilty to those charges. Appellant responded in the affirmative to both questions. His counsel then asked if he was ever convicted of a felony, to which appellant again answered affirmatively. On cross-examination, the state attorney sought to elicit the nature of the felony charge. Overruling defendant's objection, the court required McCrae to disclose to the jury that he had pleaded guilty to assault with intent to commit murder on the ground that appellant's counsel had "opened the door" to such questioning.

After the close of the evidence, the jury returned a verdict of guilty on the felony-murder count, but recommended a life sentence. As required by section 921.141(3), Florida Statutes (1975), the trial judge made findings of fact wherein he rejected the recommendation of the jury and entered a judgment calling for the death sentence. Specifically, he stated:

As presiding Judge I observed the Defendant when evidence was introduced and especially when the fingerprint expert from the F.B.I. was testifying, the

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Defendant [appellant] appeared extremely nervous and upset when this evidence was being received. Throughout the trial, as the story unfolded, the Court was struck with the heinous, atrocious and cruel murder of this elderly woman.

The Court was also aware that a person answering the description of the Defendant tried to gain entrance to the homes of two other elderly women in the same close neighborhood wherein the deceased lived in her apartment at or about the time shortly connected with the death of the deceased.

The Court is also aware that the testimony proved that the Defendant, a few months before the instant case at bar, brutally attacked a female by the name of Faith Lederman [Gertner] after he, the Defendant, had shot and seriously wounded William R. Smith, which as a result of said attack, the Defendant stood before the Court and voluntarily pleaded guilty to the crime of assault with a deadly weapon with intent to commit first degree murder.

The record in Case No. 73-372 CF, Lee County docket, reveals that the Defendant plead guilty to this charge on September 11, 1974, just about one month before the murder of Margaret Mears, the deceased in the case at bar.

The Defendant was permitted to remain at liberty on bail pending the pre sentence investigation report on Case No. 73-372 CF.

During the time the Defendant was at liberty on bail between September 11, 1973 and October 29, 1973, the murder for which the Defendant was tried and convicted in the instant case was committed.

It is interesting to note that the Defendant's fingerprints taken when he was convicted for the crime laid in Case No. 73-372 CF matched the bloody fingerprints lifted from the residence and premises occupied by the deceased, Margaret Mears, and thus resulted in the indictment and conviction of the Defendant in the case at bar.

The Court before the trial was interested in the mental state of the Defendant, and appointed experts in the field of psychiatry to thoroughly examine the Defendant. The Court held hearings on the question of the mental condition of the Defendant and after hearing the testimony of such experts held that the Defendant was fully able to distinguish the difference between right and wrong and could fully cooperate with his counsel in the preparation and conducting of his defense.

The Defendant did fully cooperate with counsel during the trial and actively advised counsel and was fully aware at all times of the proceedings during the trial.

The Defendant took the witness stand in his own behalf and demonstrated that he, the Defendant, had an excellent memory, but could not explain how his bloody fingerprints and palm prints were found on the wall near the back door of the deceased's apartment or upon books and other items in the residence.

The evidence discloses that the deceased was so brutally and viciously beaten that her blood was splattered upon the walls and ceiling of her residence, and the evidence further discloses that this elderly woman was raped, either just before her death or directly after she was murdered.

The Court sets forth the above facts as they fully appear in the trial record, and the record taken by the Official Court Reporter.

The mitigating circumstances are very minor.

The Defendant, in order to show the jury that at the time of the crime he was "under the influence of extreme mental or emotional disturbance" placed Dr. Clarence Schilt on the stand, however the good doctor could not with any degree of medical certainty say in his opinion the Defendant was so affected. The doctor in his summation stated that the prisoner was either very smart or very sick.

Therefore, when the Court takes into consideration the aggravating circumstances such as:

1. The Defendant was a self convicted felon, pleading guilty to assault to murder, and as an incident thereto, from the trial record that the Defendant had beat [sic] and choked the witness Faith Lederman in a brutal assault upon her, just a few weeks prior to the murder of Margaret Mears, and

2. That the Defendant had on the same night of the murder tried to gain entrance to the residences of two other elderly females in the same locality, and

3. That the crime was committed "according to the jury verdict" in the commission of rape, and

4. That the murder was especially heinous, atrocious, brutal and cruel.

The Court feels that these facts greatly outweigh any mitigating circumstance heard by the Court at the trial of the Defendant.

The Court further feels that the testimony of Dr. Clarence Schilt in its entirety is not sufficient to outweigh the aggravating circumstances as set forth above and as they fully appear in the record in this case.

The Court is fully aware of the great responsibility that rests squarely upon the trial Judge in matters of this kind. The Court has struggled with the weighty decision that must be made in this case, and in making the determination to override the decision of the jury that advised the sentence of life imprisonment.

The Court is not chastising or inferring that the jury was lax in their responsibility. However, as it may appear the Court feels that it is the responsibility of the Court to follow the law as written by the wisdom of our various lawmakers, that society must be protected and that an example must be set forth and made apparent so that our citizens may be secure in their homes and that they may be safe from the experiences that Margaret Mears suffered at the hands of the convicted Defendant.

The Court therefore rejects the advisory sentence of the jury in this case and will pass the sentence of death upon the Defendant, JAMES CURTIS McCRAE.

The Court feels that this action upon its part is dictated by the facts and circumstances gleaned from the trial record and that sufficient aggravating circumstances exist as enumerated in Subsection 6 to greatly outweigh any mitigating circumstances as set forth in Subsection 7 of Section 921.141, Florida Statutes.

Tr. vol. VII, 1090-9[illegible].

Appellant urges five points for reversal. We restate these points below:

(i) whether the trial court erred in allowing the state to question McCrae about a prior unrelated felony on cross-examination; (ii) whether the trial court erred in admitting the testimony of Edith Veal, Muriel Bergner, Faith Gertner and William Smith; (iii) whether the trial court's imposition of the death penalty denies appellant due process and equal protection of law and violates the mandate of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), because there is no rational distinction between first degree murder and murder in the second degree; (iv) whether the sentencing procedure enunciated in chapter 921, Florida Statutes (1975), is violative of the constitutional mandate of *Furman v. Georgia* both on its face and as applied to McCrae; and (v) whether the court erred in overruling the life sentence advisory verdict of the jury.

Following oral argument of respective counsel on these issues, appellant filed in this Court a motion for new trial with supporting affidavit pursuant to Florida Rule of Criminal Procedure 3.600, alleging newly discovered evidence. In the sworn affidavit, Otis Walker, a material witness at the trial of appellant, averred essentially that he testified falsely at trial due to coercion

and the promise of a "deal" by state officials. Appellant contended that Walker's assertion established a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and, accordingly, that he was entitled to a new trial. In an order dated November 29, 1978, we pointed out that a motion under rule 3.600 is an inappropriate pleading in an appellate court; such a motion must be addressed to the trial court. Further, because the time limit for filing this motion in the proper tribunal had expired, the only remedy for the alleged *Brady* violation was a motion in the trial court to vacate judgment and sentence under Florida Rule of Criminal Procedure 3.850. Although appellant's affiant had denied under oath at trial that he was offered a "deal" in exchange for his testimony in that proceeding, this Court nevertheless relinquished jurisdiction to the trial court to enable appellant to file a rule 2.850 motion raising the alleged *Brady* violation.

[1] Appellant thereafter filed the motion in the trial court and, on December 18, 1978, after hearing the evidence and argument presented by the parties, the trial court entered an order denying the requested relief. The judge found "that the testimony before this Court of OTIS WALKER ... is, in fact, untrue," and concluded that no *Brady* violation had occurred. Although appellant filed a notice of appeal from that order, he has not informed this Court of the grounds of his attack. Nevertheless, we have reviewed the record of the rule 3.850 proceedings. We are satisfied that the trial judge correctly ruled on the motion and, accordingly, that ruling is affirmed. We now turn to the issues on appeal.

The first point raised by appellant challenges the ruling of the trial court allowing the prosecutor to cross-examine appellant with respect to his prior criminal record. Appellant concedes that the state is entitled to cross-examine him on those issues developed during direct examination. However, he argues that the state exceeded this scope of permissible inquiry when it sought to elicit the nature of the felony to which appellant referred on direct. According to appellant, the defense established only that he had been accused of a felony and that he had admitted his guilt.

[2-5] We agree that on cross-examination the state must, as a general rule, limit itself to questions no broader in scope than those propounded by the defense. *Cortes v. State*, 135 Fla. 589, 185 So. 323 (1938); *Cook v. State*, 46 Fla. 20, 35 So. 665 (1903); 98 *C.J.S.* Witnesses, §§ 378, 393(b), 395, 401(2) (1957). In the instant case, however, the state properly transcended these bounds because defense counsel, through his questions on direct examination, tactfully attempted to mislead the jury into believing that appellant's prior felony was inconsequential. On direct examination, appellant's counsel asked his client:

> Doug, at this time I would like to ask you a few questions. I would like to begin by asking you. Have you ever been convicted of a misdemeanor?
>
> A. Yes, I have.
>
> Q. Do you recall how many times you have been convicted of a misdemeanor?
>
> A. Well, I would say over the past nine or ten years possibly about nine or ten misdemeanors.
>
> Q. Did you pay fines or did you serve time for these misdemeanors?
>
> A. I paid fines.
>
> Q. Do you recall how much in the way of fines you may have paid for misdemeanors total?
>
> A. Yes. I paid a total of $445 in fines.
>
> Q. Doug, have you ever been convicted of a felony?
>
> A. Yes, I have, one.
>
> Q. One time?
>
> A. Right.
>
> Q. Doug, these misdemeanors, this felony you told me about, were you found guilty by a judge or a jury?
>
> A. No, I was not; I pled guilty.
>
> Q. You pled guilty?

A. Yes.

Q. Why did you plead guilty?

A. Because I was guilty.

Q. How did you plead to this charge against you that you are here for today?

A. Not guilty.

Q. Why did you plead not guilty, Doug?

A. Because I'm not guilty.

This line of questioning could have deluded the jury into equating appellant's conviction of assault with intent to commit murder with his previous misdemeanors. Consequently, the state was entitled to interrogate appellant regarding the nature of his prior felony in order to negate the delusive innuendoes of his counsel. As stated by one learned scholar:

> [T]he rule limiting the inquiry to the general facts which have been stated in the direct examination must not be so construed as to defeat the real objects of the cross-examination. One of these objects is to elicit the whole truth of transactions which are only partly explained in the direct examination. Hence, questions which are intended to fill up designed or accidental omissions of the witness, or to call out facts tending to contradict, explain or modify some inference which might otherwise be drawn from his testimony, are legitimate cross-examination.

4 Jones on *Evidence*, Cross Examination of Witnesses § 25.3 (6th Ed. 1972) (footnote omitted). A defendant cannot take advantage on appeal of a situation which he has created at trial. *See Sullivan v. State*, 303 So.2d 632 (Fla.1974); *White v. State*, 348 So.2d 1170 (Fla. 3d DCA 1977); *Jackson v. State*, 336 So.2d 633 (Fla. 4th DCA 1976).

Appellant next argues that the trial court erred in admitting the testimony of four witnesses introduced by the state in its case in chief. Initially, appellant contends that the testimony of Edith Veal and Muriel Bergner, placing him in the immediate area where the crime was committed at the approximate hour of its commission, should have been excluded for three reasons: (1) the two witnesses were unable positively to identify him and, therefore, their testimony was irrelevant; (2) assuming there had been a positive identification, there was no relevance between Mrs. Veal's and Mrs. Bergner's experience and the crimes committed; and (3) the testimony of the two women did not suggest an attempt to commit similar crimes against them.

[6, 7] Any testimony relevant to prove the fact in issue is admissible unless precluded by some specific rule of exclusion. *Johnson v. State*, 130 So.2d 599 (Fla.1961); *Williams v. State*, 110 So.2d 654 (Fla.1959). Furthermore, relevant evidence will not be excluded merely because it points to commission of a separate crime, unless its sole relevance is to point up bad character or the criminal propensity of an accused. *Mackenzie v. State*, 114 So.2d 684 (Fla.1959); *Williams v. State*; *Jordan v. State*, 171 So.2d 418 (Fla. 1st DCA 1965). As appellant correctly notes, the testimony of Edith Veal and Muriel Bergner did not present evidence of another crime, thereby suggesting appellant's criminal propensities. Because appellant has not suggested any other specific rule mandating that this testimony be excluded, the witnesses' testimony is admissible if it is relevant.

[8] Although appellant argues that the testimony of Mrs. Veal and Mrs. Bergner is irrelevant because they failed to identify him, he ignores the fact that both witnesses stated that the person who attempted to gain entrance to their homes met the general description of appellant. Both women described an individual closely resembling appellant who, on October 13, 1973, was in the immediate area where the crime was committed at the approximate time of its commission. Therefore, their testimony was relevant and admissible as to the issue of identity. Appellant's contentions are merely questions for the jury as to the weight to be accorded the testimony.

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[9] Appellant also argues that the testimony of Faith Gertner and William Smith was irrelevant because the incident which they described occurred almost six months before the instant crime. Similarly, appellant submits there was no factual thread connecting the two events. We disagree. Mrs. Gertner's testimony was admissible because she was able to identify the appellant and because, allegedly, she established that a common plan or scheme was employed by appellant to gain admittance to the victims' homes. *Bryant v. State*, 235 So.2d 721 (Fla. 1970); *Winstead v. State*, 91 So.2d 809 (Fla. 1956).

[10] Appellant's third point is that he was denied due process and equal protection of law when he was charged under section 782.04(1)(a), Florida Statutes (1975), the first degree murder statute, rather than for murder in the second degree under section 782.04(2). This Court's decisions in *Adams v. State*, 341 So.2d 765 (Fla.1976), and *State v. Dixon*, 283 So.2d 1 (Fla.1973), dictate that appellant's argument must fail on this issue.

[11] Appellant's fourth point has been decided adversely to his cause in *State v. Dixon*.

[12-14] Appellant argues further that the trial court violated the principles espoused in *Tedder v. State*, 322 So.2d 908 (Fla.1975), in overruling the advisory verdict of the jury for a life sentence. During the sentencing phase of the proceedings the court found three aggravating circumstances under section 921.141(5), Florida Statutes (1975): (1) that appellant was previously convicted of a felony involving the use or threat of violence to the person [subsection (b)]; (2) that the crime was committed while appellant was engaged in the commission of a rape [subsection (d)]; and (3) that the crime was especially heinous, atrocious and cruel [subsection (h)]. The finding of the second aggravating circumstance under section 921.141(5)(b) was clearly proper. Further, the trial judge determined correctly that the crime was especially heinous, atrocious or cruel. The evidence disclosed that the victim, a sixty-seven-year-old woman, was so brutally beaten about the head and chest that her blood was splattered upon the walls and ceiling of her residence. According to the testimony of Dr. Rosser, the medical examiner who viewed the scene of the crime and performed an autopsy on Ms. Mears, the pattern of blood stains on the wall indicated that she was either sitting or standing when the attack began. At some point the victim was thrown to the floor and her ribs were crushed, resulting in death by asphyxiation within four minutes thereafter. (Tr. vol. III, 499-512.) The rape occurred either shortly before or immediately following Ms. Mears' death. The agony and horror which this elderly woman must have suffered prior to her death is evident. As we acknowledged in *State v. Dixon*, 283 So.2d at 9, section 921.141(5)(h) applies to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." The killing in this case falls squarely within this category when viewed in the context of prior decisions of this Court where we have approved a finding of this aggravating circumstance. *See Washington v. State*, 362 So.2d 658 (Fla.1978) (victim repeatedly stabbed while tied to a bed, with evidence of suffering); *Barclay v. State*, 343 So.2d 1266 (Fla.1977) (victim stabbed while begging for mercy and then killed by shots to the head); *Adams v. State* (victim beaten with fire poker past point of submission and until grossly mangled.)

[15] The appellant further contends that the trial judge improperly found under section 921.141(5)(b), Florida Statutes (1975), that he had been previously "convicted" of a felony involving the use or threat of violence to the person. At the time of his trial in the instant case, McCrae had already pleaded guilty to assault with intent to commit murder upon Faith Gertner and William Smith. Pending sentencing on this charge, he was released on bail without adjudication of guilt, awaiting the completion of the presentence investigation

report. Shortly after his release on bail, McCrae, as found by the jury in this cause, sexually assaulted and murdered the victim, Margaret Mears. McCrae contends that he had not been convicted of his prior offense against Gertner and Smith because the judge had not adjudicated him guilty. We reject this contention and find the plea of guilty to a felony involving the use or threat of violence to the person is a conviction which may be used in aggravation under section 921.141(5)(b) and was so intended by the legislature.

[16] In *Robinson v. State*, 373 So.2d 898 (Fla.1979), we held that a plea of guilty is an in-court confession and an agreement for the court to enter a judgment. We further cited with approval the decision of the United States Supreme Court in *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969), which stated: "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." [Emphasis supplied.] These decisions recognize that once a plea of guilty has been accepted by a court, it is the conviction and the only remaining step is the formal entry of judgment and the imposition of sentence.

[17] Further, in determining whether the death penalty should be imposed, a court must consider the various circumstances set forth in section 921.141. These circumstances aid the judge in establishing the overall character analysis of a defendant so that he may properly determine the appropriate sentence within the limits set forth in the law. *Elledge v. State*, 346 So.2d 998 (Fla.1977). Prior convictions of violent felonies is an extremely important factor in the sentencing process. Given the purpose of this process, it is illogical that a plea of guilty to a serious offense involving violence that is disposed of by a sentence that includes a withholding of adjudication of guilt should be treated differently than a plea of guilty with court adjudication. Both contain an unrefuted factual determination that the defendant committed this prior criminal offense.

In interpreting "conviction" for the purposes of section 921.141(5)(b), we reject any analogy to the habitual offender statute set forth in section 775.084. The habitual offender statute creates a separate criminal offense that requires both (a) a determination of guilt by a jury or a plea of guilty, and (b) an adjudication of guilt by the court. *Washington v. Mayo*, 77 So.2d 620 (Fla.1955). This statute was enacted by the legislature "to protect society from habitual criminals who persist in the commission of crime after having been theretofore convicted and punished for crimes previously committed." *Joyner v. State*, 30 So.2d 304, 306 (Fla.1947). It is a new and separate criminal offense, and "adjudication of guilt" is a necessary element of the offense.

[18] On the other hand, this Court in *Elledge v. State* recognized the purpose for considering prior criminal conduct in the capital sentencing process is to ensure a proper character analysis to determine if the ultimate penalty of death should be imposed. Specifically, we said:

> [W]e believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge.

346 So.2d at 1001. The fact that an adjudication of guilt is a prerequisite, as a technical element of the offense, to a conviction under the habitual offender statute, is thus of no analogous value to the instant case. The word "convicted" as used in section 921.141(5)(b) means a valid guilty plea or jury verdict of guilty for a violent felony, an adjudication of guilt is not necessary for such a "conviction" to be considered in the capital sentencing character analysis.

[19] The final sentencing issue concerns the appellant's attempt to prove in mitigation under section 921.141(6)(b) that he was under the influence of extreme mental or emotional disturbance at the time the

crimes were committed. In our view, the trial judge rejected this mitigating circumstance. The judge noted in his findings of fact that "the mitigating circumstances are very minor" and that the aggravating circumstances "greatly outweigh any mitigating circumstances." As to this specific mitigating circumstance, however, the trial judge remarked that the doctor through whose testimony appellant submitted his proof, "could not with any degree of medical certainty" say that appellant satisfied the criteria of subsection (6)(b). However, it is apparent to us that the jury must have found this mitigating circumstance to exist. There is no other explanation for their advisory verdict in view of the heinous nature of the killing. We find their recommendation has no reasonable basis under the circumstances of this cause.

[20, 21] We realize the advisory recommendation of the jury must be accorded a great weight, *Tedder v. State*, 322 So.2d 908 (Fla.1975), but in our view the decision of the trial judge to impose the death sentence over the jury recommendation of life was in these circumstances proper. *Hoy v. State*, 353 So.2d 826 (Fla.1977); *Dobbert v. State*, 328 So.2d 433 (Fla.1976), *aff'd*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), *aff'd after Gardner* order, 375 So.2d 1069 (1979).

For the reasons expressed in this opinion, we affirm the appellant's conviction and sentence of death.

It is so ordered.

SUNDBERG, C.J., and ADKINS, BOYD, OVERTON, ENGLAND and ALDERMAN, JJ., concur.

SUNDBERG, C.J., concurs specially in result with an opinion.

SUNDBERG, Chief Justice, concurring specially in result.

While I concur with the result reached by the majority, I must respectfully register my disagreement with one aspect of the opinion. Based on the authority of *Robinson v. State*, 373 So.2d 898 (Fla.1979), and *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), I agree that a plea of guilty to a violent felony properly may be considered as an aggravating circumstance under section 921.141(5)(b), Florida Statutes (1977). As stated in *Boykin*, such a plea is more than a confession, "it is itself a conviction." 395 U.S. at 242, 89 S.Ct. at 1711, 23 L.Ed.2d 274. Absent any suggestion by the defendant that the plea was involuntarily entered or the pendency of a motion to set it aside, the formality of entry of judgment and imposition of sentence by the Court should not be dispositive of the vitality of the conviction. Where appeal of a conviction is pending at the time of sentencing under chapter 921, however, quite another question is presented. Consequently, I cannot subscribe to the more sweeping statement by the majority which rejects any analogy to the habitual offender statute, section 775.084, Florida Statutes (1975). My reasons for this view are expressed in my dissent in *Peek v. State*, 395 So.2d 492 (Fla.1980), and no useful purpose would be served by repeating them here.

ON REHEARING

PER CURIAM.

This cause was initially argued on March 5, 1975. It was subsequently scheduled for reargument on September 20, 1977. Appellant's counsel thereafter requested that this Court relinquish jurisdiction so that he could file a petition for post-conviction relief under Rule of Criminal Procedure 3.850 on the ground that a witness committed perjury during trial. We granted the request and relinquished jurisdiction by our order dated November 29, 1978. After an evidentiary hearing, the trial court denied appellant's petition for post-conviction relief. Appellant filed a notice of appeal on March 8, 1979. The record was received by the Court, but, through inadvertence, the briefs were not made available for Court review. As stated in our original majority opinion, "[a]lthough appellant filed a notice of appeal from that order, he has not informed this Court of the grounds of his attack. Nevertheless, we have reviewed

the record of the rule 3.850 proceedings. We are satisfied that the trial judge correctly ruled on the motion and, accordingly, that ruling is affirmed."

[22] On this petition for rehearing, the briefs filed in the post-conviction proceeding have been made available to the Court. Appellant's brief asserts that the trial court erred in finding the witness's testimony at trial to be true and the testimony at the post-conviction hearing to be false. The remaining points are dependent upon this alleged erroneous finding. We have reviewed the record of the post-conviction relief proceeding in light of the assertions made in appellant's brief, and we have concluded that the evidence is sufficient to affirm the trial court's finding. Our opinion is corrected to reflect our consideration of the appellant's briefs.

The remaining issues set forth in the petition for rehearing are without merit and are denied.

It is so ordered.

SUNDBERG, C.J., and ADKINS, BOYD, OVERTON, ENGLAND and ALDERMAN, JJ., concur.

DINERS CLUB, INC., Petitioner,

v.

Donald F. BRACHVOGEL et al., Respondents.

No. 57046.

Supreme Court of Florida.

Oct. 30, 1980.

As Modified on Denial of Rehearing April 14, 1981.

Judgment debtor moved to set aside default judgment on grounds that her husband never told her about lawsuit resulting in judgment that she was unaware of it, and that she had a legitimate defense. The District Court of Appeal, Third District, 370 So.2d 443, granted motion, and appeal was taken. The Supreme Court, McDonald, J., held that there was no abuse of discretion in trial judge vacating default upon claim against moving party that excusable neglect existed for not answering.

Writ discharged.

Overton, J., concurred in result only.

Sundberg, C. J., and England, J., dissented.

Judgment ⇐139

Trial judge did not abuse discretion in vacating default upon claim of moving party that excusable neglect existed for not answering as the movant had practical basis for not timely answering plus tendered defense upon which she might prevail.

Arnold R. Ginsberg of Horton, Perse & Ginsberg and Carl L. Laks, Miami, for petitioner.

Carol A. Fenello of Bradford, Williams, McKay, Kimbrell, Hamann, Jennings & Knukern, Miami, for respondents.

McDONALD, Justice.

This cause is before the Court on petition for writ of certiorari to review the decision of the Third District Court of Appeal, reported at 370 So.2d 443 (Fla.3d DCA 1979). The district court affirmed without opinion a circuit court order vacating a default judgment against Mrs. Brachvogel. Finding apparent conflict between that decision and *Barnett Bank of Clearwater, N. A. v. Folsom*, 306 So.2d 186 (Fla.2d DCA 1975), we entertained jurisdiction.[1]

Diners Club sued the Brachvogels on their credit card account. The Dade County Sheriff served process and complaint for

1. Art. V, § 3(b)(3), Fla.Const. (1972).

Supreme Court of Florida

TUESDAY, SEPTEMBER 14, 1982

JAMES CURTIS McCRAE, **
Petitioner, **
vs. ** CASE NO. 61,865
LOUIE L. WAINWRIGHT, **
Respondent. **
** ** ** ** ** ** **

Order on Motion for Rehearing

PER CURIAM.

Respondent having filed a motion for rehearing of this matter, we hereby grant the motion and vacate our decision and opinion of March 25, 1982.

It is so ordered.

ALDERMAN, C.J., ADKINS, BOYD and EHRLICH, JJ., Concur
OVERTON, SUNDBERG and McDONALD, JJ., Dissent

A True Copy

TEST:

Sid J.
Clerk

JB

cc: Robert H. Dillinger, Esquire
Robert J. Landry, Esquire

Supreme Court of Florida

No. 61,365

JAMES CURTIS McCRAE, Petitioner,

vs.

LOUIE L. WAINWRIGHT, Respondent.

[September 14, 1982]

On Rehearing Granted

PER CURIAM.

This cause is before the Court on McCrae's petition for a writ of habeas corpus and a stay of execution. Petitioner is now imprisoned under sentence of death pursuant to judgment and sentence affirmed by this Court in McCrae v. State, 395 So.2d 1145 (Fla.), cert. denied, 102 S. Ct. 583 (1981). Petitioner raises three issues going to the legality of his judgment and sentence. The asserted grounds for relief are: (1) that the trial court committed fundamental error by not fully instructing the jury on the elements of the underlying felony in this felony murder case, (2) that petitioner's appellate counsel was ineffective in that he did not raise the asserted fundamental error on appeal, and (3) that this Court violated petitioner's rights by receiving non-record information concerning appellants in pending capital appeals.

Petitioner was charged with first-degree murder. The indictment was in two counts (though there was but one homicide), one charging premeditated murder and the other felony murder. The first count of the indictment read as follows:

> [O]ne JAMES CURTIS McCRAE did unlawfully, feloniously and from a premeditated design to effect the death of one MARGARET MEARS, did strike, [illegible]st, bruise and wound the said MARGARET MEARS, [illegible] and thereby inflicting on and upon the head or body of the said MARGARET MEARS certain mortal wounds of which said mortal wounds the said MARGARET MEARS did between October 13, 1973 and October 15, 1973 die; contrary to the statute in such case made and provided and against the peace and dignity of the State of Florida.

The second count, charging felony murder, was worded as follows:

> [O]ne JAMES CURTIS McCRAE did unlawfully and feloniously effect [illegible]e death of MARGARET MEARS in perpetrating or attempting to perpetrate a rape, to-wit: did unlawfully and feloniously ravish and carnally know a female of more than ten (10) years of age, to-wit: MARGARET MEARS by force and against her will, contrary to the statute in such case made and provided and against the peace and dignity of the State of Florida.

For the count charging petitioner with premeditated murder, the court instructed the jury in accordance with the standard jury instructions. With regard to the second count, charging felony murder, the court gave the following general felony murder instruction:

> The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree even though there is no premeditated design or intent to kill.
>
> If a person kills another while he is trying to do or commit any arson, rape, robbery, burglary, the abominable detestable crime against nature or kidnapping, or while escaping from the immediate scene of such crime the killing is in the perpetration or in the attempt to perpetrate such arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping and is murder in the first degree.

The instructions to the jury also included a reading of the indictment as set out above. The indictment was given to the jury, along with the forms for the verdict, to take with it into deliberations. The second count of the indictment, charging felony murder, specified the underlying felony and defined it in terms of its essential elements.

The trial court, in instructing the jury on the form of the verdict, advised that the jury could return a verdict as to the two counts collectively or individually. The court provided

separate verdict forms for verdicts of (1) not guilty, (2) guilty on both count one and count two, (3) guilty on count one, (4) guilty on count two, and (5) guilty of lesser included offenses. The jury returned a verdict finding petitioner guilty as charged in count two, the felony murder count. The other verdict forms were left blank.

Petitioner argues that under State v. Jones, 377 So.2d 1163 (Fla. 1979), and Robles v. State, 188 So.2d 789 (Fla. 1966), the trial court erred fundamentally in not instructing the jury on the elements of the underlying felony. Robles and Jones are based on the principle that a jury cannot properly find a defendant guilty of felony murder without knowing precisely what conduct constitutes the underlying felony. We find that the instruction was adequate and there was no fundamental error.

In Vasil v. State, 374 So.2d 465 (Fla. 1979), the defendant was charged with felony murder involving the crime of rape. On appeal, Vasil argued that the court had erred in failing to fully define the underlying felony of rape. The court charged the jury on felony murder and rape as follows:

> If a person kills another in trying to do or commit any rape, or while escaping from the immediate scene of such crime, the killing is in perpetration of or in the attempt to perpetrate such crime.
>
> It is the crime of rape to ravish or carnally know a female person of the age of eleven years or more by force and against her will.

In appealing his conviction to this Court the defendant argued that the above definition was not sufficient to inform the jury of the elements of the underlying felony of rape. In response to that argument the Court held that:

> The trial court, in instructing the jury on the underlying felony, recited all of the elements of the crime of rape. It is not necessary to instruct on the elements of the underlying felony with the same particularity that would be required if that offense were the primary crime charged. See Robles v. State, 188 So.2d 789 (Fla. 1966). The instruction on the underlying felony was adequate.

The same principle applies here.

In the instant case, the trial court failed to include an instruction on the elements of rape in its charge to the jury.

but did announce to the jury the specific language contained in the second count of the indictment. As in Vasil, the jury was apprised of the essential elements of the underlying felony. Therefore the trial court complied substantially with Nonies and Jones.

Since there was no fundamental error which would have mandated reversal on appeal, petitioner's second contention--that his appellate counsel rendered ineffective assistance by failing to raise the fundamental error on appeal--is also without merit. Under the standards announced in Knight v. State, 394 So.2d 997 (Fla. 1981), petitioner has failed to establish ineffective assistance of counsel.

As his third ground for habeas corpus relief, petitioner asserts that this Court requested and received ex parte information concerning appellants in capital appeals during the time when his appeal was pending here. We considered and rejected this argument in Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 102 S.Ct. 542 (1981). There we held that the allegations of receipt and consideration of such information by appellate judges, even if true, did not establish error which would entitle the petitioners to habeas corpus relief.

Having determined that petitioner is not entitled to habeas corpus relief we deny the petition.

It is so ordered.

ALDERMAN, C.J., ADKINS, BOYD and EHRLICH, JJ., Concur
OVERTON, SUNDBERG and McDONALD, JJ., Dissent

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Original Proceeding - Habeas Corpus

Robert H. Dillinger of Stolba, Lumley and Dillinger, St. Petersburg, Florida.

for Petitioner

Jim Smith, Attorney General and Robert J. Landry, Assistant Attorney General, Tampa, Florida.

for Respondent

82-6555

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO. A-375

JAMES CURTIS McCRAE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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ATTORNEY GENERAL

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COUNSEL FOR RESPONDENT

/jaf

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Respondent accepts those portions of the Petition for Writ of Certiorari setting forth the Citations to Opinions Below, Jurisdiction, Constitutional and Statutory Provisions Involved found on pages 1 and 2 of the Petition.

QUESTIONS PRESENTED

1. In a felony murder conviction in which the felony murder constitutes the sole basis for the Petitioner's conviction of murder in the first degree, does the failure of the trial court to instruct the jury that the Petitioner is presumed innocent of the underlying felony involved in the felony murder violate the Sixth, Eighth and Fourteenth Amendments to the United States Constitution?

2. In a felony murder conviction in which the felony murder constitutes the sole basis for the Petitioner's conviction of murder in the first degree, does the failure of the trial court to instruct the jury that before the Petitioner can be convicted of felony murder, the underlying felony involved in the felony murder must be proved beyond a reasonable doubt violate the Sixtn, Eighth and Fourteenth Amendments to the United States Constitution?

3. In a felony murder conviction in which the felony murder constitutes the sole basis for the Petitioner's conviction of murder in the first degree, does the trial court's failure to instruct on the elements of the underlying felony charged in the felony murder indictment violate the Sixth, Eighth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

Petitioner James Curtis McCrae was tried and convicted of first degree murder. The Florida Supreme Court affirmed the judgment and sentence. McCrae v. State, 395 So.2d 1145 (Fla. 1981). This Court denied certiorari review. McCrae v. Florida, 454 U.S. 1037, 70 L.Ed.2d 486 (1981). Thereafter, Petitioner

filed a Petition for Writ of Habeas Corpus in the Florida Supreme Court urging that his appellate counsel had been ineffective and that the trial judge had improperly failed to explain the elements of the underlying felony in the felony-murder. 1/ The Florida Supreme Court rejected Petitioner's claim. McCrae v. Wainwright, 422 So.2d 824 (Fla. 1982). McCrae now seeks again certiorari relief in this Court.

Following the submission of evidence at trial, the trial court instructed the jury:

> "THE COURT: Ladies and Gentlemen of the Jury:
>
> You have listened carefully to the evidence and the argument of counsel. I now ask of you the same careful attention to the law, as determined by the Court, which you must apply to the facts as you find them from the evidence.
>
> You alone, as jurors sworn to try this case, must pass on the issues of fact, and your verdict must be based solely on the evidence or lack of evidence and the law as it is given to you by this Court.
>
> (R. 822)
>
> * * *
>
> Count 2 of the indictment charges that one James Curtis McCrae did unlawfully and feloniously effect the death of Margaret Mears in perpetrating or attempting to perpetrate a rape, to-wit: did unlawfully and feloniously lavish and carnally know a female of more than ten years of age, to-wit: Margaret Mears by force and against her will, contrary to the statute in such case made and provided and against the peace and dignity of the State of Florida.
>
> (R. 823)
>
> * * *
>
> The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree even though there is no premeditated design or intent to kill.

1/ Attached as Respondent's Exhibit A is a copy of McCrae's Petition for Writ of Habeas Corpus. Since this was the only instruction issue presented below, Questions 1 and 2 of the instant petition have not been preserved for subsequent review.

If a person kills another while he is trying to do or commit any arson, rape, robbery, burglary, the abominable detestable crime against nature or kidnapping or while escaping from the immediate scene of such crime the killing is in the perpetration or in the attempt to perpetrate such arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping and is murder in the first degree.

(R. 830-831)

* * *

The Defendant has entered his plea of not guilty, and the effect of this plea is to require the State to prove each material allegation of the indictment beyond and to the exclusion of every reasonable doubt before the Defendant may be found guilty.

I charge you that it is to the evidence and to it alone that you are to look for such proof.

(R. 836)

* * *

I charge you that the defendant in every criminal case is presumed to be innocent until his guilt is established by the evidence to the exclusion of and beyond every reasonable doubt.

Before the presumption of innocence leaves the defendant, every material allegation of the indictment must be proved by the evidence to the exclusion of and beyond every reasonable doubt. This presumption accompanies and abides with the Defendant as to each and every material allegation of the indictment through each stage of the trial until it has been overcome by the evidence to the exclusion of and beyond every reasonable doubt.

If any of the material allegations of the indictment is not proved to the exclusion of and beyond every reasonable doubt, you must give the Defendant the benefit of the doubt and find him not guilty; but if you find from the evidence beyond and to the exclusion of every reasonable doubt that all the material allegations of the charges have been proved, then you must find him guilty.

To overcome the presumption of innocence of the Defendant and establish his guilt, it is not sufficient to furnish evidence

merely tending to prove guilt, nor to prove a mere probability of guilt, but proof of guilt to the exclusion of and beyond every reasonable doubt is absolutely necessary.

(R. 836-838)

* * *

It is to the evidence introduced upon this trial and to it alone that you are to look for such proof."

(R. 839)

Defense counsel deemed these instructions to be unobjectionable. 2/

REASONS FOR DENYING
THE PETITION FOR WRIT OF CERTIORARI

As in Engle v. Isaac, 456 U.S. 107, 71 L.Ed.2d 783 (1982) and United States v. Frady, 456 U.S. 152, 71 L.Ed.2d 816 (1982), Petitioner waited several years before complaining about the adequacy of jury instructions in a trial at which he had no objection at the time. McCrae murdered Margaret Mears in October of 1973. Following the presentation of evidence at trial, Petitioner did not object to the trial court's instructions which Petitioner now challenges. Florida law requires a criminal defendant to object to instructions in the lower court to preserve the point for appellate review. Rule 3.390(d), Florida Rules of Criminal Procedure; Adams v. State, 412 So.2d 850 (Fla. 1982); Ashley v. State, 264 So.2d 685 (Fla. 1972). In addition, Petitioner did not attempt to raise as an issue on direct appeal the now complained of instruction. The Florida Supreme Court affirmed the judgment and sentence on October 30, 1980. McCrae v. State, 395 So.2d 1145 (Fla. 1981). Petitioner sought certiorari review which was denied. McCrae v. Florida, 454 U.S. 1037, 70 L.Ed.2d 486 (1981). Thereafter, Petitioner first challenged the given instructions in a habeas corpus petition in the Florida Supreme Court. Relief was denied. McCrae v. Wainwright, 422 So.2d 824 (Fla. 1982). Now, Petitioner seeks certiorari review

2/ Significantly, defense counsel's theory of defense was that Petitioner did not commit the homicide, not that a rape was not committed (R. 780, 818).

again. 3/

This Court has in recent years consistently maintained that federal habeas corpus courts should deny relief where a state prisoner has failed to comply with state procedural rules requiring timely and proper objection for preservation for subsequent review. Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594 (1977); Estelle v. Williams, 425 U.S. 501, 48 L.Ed.2d 126 (1976); Engle v. Isaac, 456 U.S. 107, 71 L.Ed.2d 783 (1982). Similar results obtain for federal prisoners. United States v. Frady, 456 U.S. 152, 71 L.Ed.2d 816 (1982).

Secondly, Petitioner in the lower court urged not a federal constitutional question but only a question of state law, to-wit: whether the given instruction violated state law decisions, Robles v. State, 188 So.2d 789 (Fla. 1966) and State v. Jones, 377 So.2d 1163 (Fla. 1979). A petitioner may not initiate federal constitutional issues on certiorari. See Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 389 (1969). 4/

Third, Petitioner has failed to cite any decisions which hold that relief on a collateral attack to an unobjected to instruction such as in the instant case is available. In Henderson v. Kibbe, 431 U.S. 145, 52 L.Ed.2d 203 (1977), the Court opined:

> "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process', Cupp v. Naughten, 414 U.S. at 147, 38 L.Ed.2d 368, 94 S.Ct. 396, not merely whether 'the instruction is undesirable, erroneous, or even universally condemned', id at 146, 38 L.Ed.2d 368, 94 S.Ct. 396."

3/ Respondent respectfully submits that if Petitioner really seeks a second certiorari review from the affirmance of his judgment and sentence in the opinion reported at 395 So.2d 1145, he is obviously untimely.

4/ Petitioner may suggest that raising a federal claim on rehearing suffices. But it does not. Rule 9.330(a), Rules of Appellate Procedure, prohibits reargument on the merits. There is no reason why the Petitioner could not have asserted in his initial habeas petition all the grounds (based on state and federal grounds) to support his contention; Petitioner's failure to urge a federal basis for his claim below precludes review now here.

> In this case, the respondent's burden is especially heavy because no erroneous instruction was given: his claim of prejudice is based on the failure to give any explanation — beyond the reading of the statutory languages itself — of the causation element. An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law."
>
> (52 L.Ed.2d at 212-213)

As the Florida Supreme Court found, during the trial court's instructions to the jury, the trial judge read Count 2 which adequately described the underlying felony and its essential elements. 5/ 422 So.2d at 825. The Constitution commanded no more.

Petitioner is not aided by the decisions of this Court cited in his petition. In Taylor v. Kentucky, 436 U.S. 478, 56 L.Ed.2d 468 (1978), this Court reversed a judgment for the failure to give a requested jury instruction on the presumption of innocence and the circumstances of that case revealed a due process violation. Subsequently, in the decision of Kentucky v. Whorton, 441 U.S. 786, 60 L.Ed.2d 640 (1979), the Court explained that Taylor was a limited holding, confined to its particular facts:

> ". . . the Court did not there fashion a new rule of constitutional law requiring that such an instruction be given in every criminal case. Rather, the Court's opinion focused on the failure to give the instruction as it related to the overall fairness of the trial considered in its entirety. . .
>
> * * *
>
> . . . In short, the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution. Under Taylor, such a failure must be evaluated in light of the totality of the circumstances — including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors — to determine whether the defendant received a constitutionally fair trial."
>
> (60 L.Ed.2d at 648)

In the instant case, there was no request for the now-desired instruction and Petitioner's guilt was overwhelming (his bloodied

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5/ The jury was also instructed that the material allegations of the indictment must be proved beyond and to the exclusion of every reasonable doubt.

fingerprints were left at the scene of the homicide).

Finally, Petitioner has not at any time raised the issue in a Florida court pertaining to the presumption of innocence instruction — not at the time of trial, not on direct appeal, and not even in his petition for writ of habeas corpus in the Florida Supreme Court. In short, there is no ruling on this point by the lower court subject to this Court's review. See Cardinale, supra.

It is clear that Petitioner presented below only a question of state law which was resolved adversely to him and that he seeks to have this Court review a matter of state law or to consider questions not submitted to or addressed by the lower court. Since no substantial federal constitutional question is presented, review of the order of denial of collateral relief by the Florida Supreme Court is inappropriate. The instant petition should be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Regular Mail to: Robert H. Dillinger, Esquire, Akerson, Swisher, Dillinger & Brett, 1135 Pasadena Avenue South, Suite 140, St. Petersburg, Florida 33707 this 19th day of April, 1983.

Of Counsel for Respondent

IN THE SUPREME COURT OF FLORIDA

JAMES CURTIS McCRAE,)

Petitioner,)

vs.) CASE NO. _____

LOUIE L. WAINWRIGHT,)
Secretary, Department of
Corrections, State of Florida,)

Respondent.)

_____)

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, JAMES CURTIS McCRAE, through his undersigned counsel and pursuant to Rules 9.031(a)(3) and 9.100, Florida Rules of Appellate Procedure, petitions this honorable Court to issue its writ of habeas corpus, in the above-styled cause, and states as follows:

1. Petitioner was found guilty of first degree felony murder by the Circuit Court of the Twentieth Judicial, in and for Lee County, Florida, on April 18, 1974. On the same day, the penalty trial was held and the jury returned an advisory sentencing verdict of life imprisonment. On May 21, 1974, the circuit court sentenced Petitioner to death. A direct appeal was taken to this Court, which affirmed the judgment of conviction and death sentence in McCrae v. State, 395 So.2d 1145 (Fla. 1981).

Clemency proceedings were held before the Executive Clemency Board on December 16, 1981. The Governor signed Petitioner's Death Warrant on March 4, 1982. The Warrant is effective from Noon, March 25, 1982 until Noon, April 1, 1982. Petitioner's execution is currently scheduled for 7:00 A.M., Wednesday, March 31, 1982.

2. Jurisdiction of this Court is invoked pursuant to Article V, §3(b)(9), Florida Constitution and Rule 9.030(a)(3), Florida Rules of Appellate Procedure. It involves the proceedings before this Court and thus, this Court's jurisdiction is properly invoked. See Knight v. State, 394 So.2d 997, 999 (Fla. 1981); cf. Foster v. State, 400 So.2d 1, 4 (Fla. 1981).

RESPONDENT'S EXHIBIT "A"

GROUNDS OF ILLEGALITY
OF PETITIONER'S CONVICTION
AND DEATH SENTENCE

3. Petitioner was denied the effective assistance of counsel in his direct appeal to this Court, in violation of the guarantees of the Sixth and Fourteenth Amendments where his appellate counsel failed to present to this Court a fundamental error which would require reversal of Petitioner's conviction. Such omission resulted in Petitioner being denied reasonably effective assistance of counsel as defined by this Court in Meeks v. State, 382 So.2d 673 (Fla. 1980) and Knight v. State, 394 So.2d 997 (Fla. 1981).

Specifically counsel failed to present to this Court the following issue:

> Whether the trial court committed fundamental error by its failure to instruct the jury in this felony murder prosecution that the elements of the underlying felony must be proven in order to support a verdict based upon felony murder and by its failure to define any underlying felony in its instructions.

Petitioner was denied effective assistance of counsel by the failure to present that issue, because had that issue been presented, the decisions of this Court would have compelled reversal of this cause for a new trial.

This Court's decision in Robles v. State, 188 So.2d 789 (Fla. 1966) is determinative. In Robles this Court held that failure to instruct on the underlying felony in a felony murder prosecution requires reversal regardless of whether trial counsel requested such an instruction. Robles was reaffirmed by this Court in State v. Jones, 377 So.2d 1163 (Fla. 1979) and Franklin v. State, 403 So.2d 975 (Fla. 1981). Proof of the underlying felony is an essential element of felony murder and thus failure to instruct upon the need to prove the underlying felony and to define the underlying felony constitutes fundamental error requiring a new trial.

In the present case, the trial court omitted any instruction on the underlying felony. The Court instructed the jury on first degree murder, in pertinent part as follows:

> Murder in the first degree: Murder in the first degree is the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature of kidnapping.
>
> • • •
>
> The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree even though there is no premeditated design or intent to kill.
>
> If a person kills another while he is trying to do or commit any arson, rape, robbery, burglary, the abominable detestable crime against nature or kidnapping, or while escaping from the immediate scene of such crime the killing is in the perpetration or in the attempt to perpetrate such arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping and is murder in the first degree.

(R 828-831). This instruction thus omitted any specification of or definition of an underlying felony to support a felony murder conviction. The instruction is therefore plainly inadequate and improper under Robles v. State, supra; State v. Jones, supra; and Franklin v. State, supra. The error in this case is not harmless under the rationale of Knight v. State, supra, because the evidence of premeditation was not sufficient.

Accordingly, Petitioner was denied the effective assistance of counsel in his direct appeal.

4. Petitioner was denied due process of law and a fair trial by the trial court's failure to instruct the jury upon the underlying felony in this felony murder prosecution. As discussed in the preceding paragraph, the instruction by the trial court on first degree felony murder was wholly inadequate under

Robles v. State, supra, and subsequent decisions. This error is fundamental, that is, it constitutes fatal error regardless of counsel's failure to object: "Counsel's failure does not relieve a trial court of the duty to give all charges necessary to a fair trial of the issues." Franklin v. State, supra, 403 So.2d at 976. Under Florida law, fundamental error can be raised and reviewed at any stage of the proceedings. E.g. Flowers v. State, 351 So.2d 387, 390 (Fla. 2d DCA 1975). Accordingly, since the error in this case is of constitutional dimension and is fundamental, this Court should reach the question on its merits at this time and should vacate the judgment and remand this cause for a new trial.

5. (a) The Supreme Court of Florida's practice, unauthorized and unannounced by statute or rule, of requesting and receiving ex parte information concerning appellants in pending capital appeals, including Petitioner herein, without notice to these appellants or their attorneys, denied death-sentenced appellants due process of law, the effective assistance of counsel, and the right of confrontation and subjected them to cruel and unusual punishment and to compulsory self-incrimination, in violation of the Fourteenth Amendment and its corporated guarantees.

The Supreme Court of Florida, since at least as early as 1975, has engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal. The information includes, but is not limited to: pre-sentence investigation reports concerning the capital offense under review or prior convictions unrelated to the capital offense; psychiatric evaluations or contact notes; psychological screening reports; recitations of a capital defendant's refusal to submit to a psychiatric examination from which a report could be prepared; post-sentence investigation reports; probation or parole violation reports; and state prison classification and admissions summaries.

Except as to some of the pre-sentence investigations pertaining to the offense on appeal the above information was requested and received without notice to the capital appellants or their attorneys. Upon information and belief, a quantity of the information received by the Court, and of records reflecting the practice of requesting and receiving it, has, at the Court's direction, been destroyed or purged from the Court's files. As a result, it is no longer possible to identify all of the cases in which such information was requested or received.

(b) In Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), this Court decided this issue.

(c) Petitioner, JAMES CURTIS McCRAE's original appeal (and an associated appeal of a Rule 3.850 proceeding) was pending in the Supreme Court of Florida from June 20, 1974 (the date the Notice of Appeal was filed) until April 9, 1981 (the date the Petition for Rehearing was denied). Petitioner's case was pending in the Supreme Court of Florida during the time the practice of the Court described above was on-going.

WHEREFORE, Petitioner prays that this Honorable Court issue its order to show cause forthwith and issue a writ of habeas corpus ordering that Petitioner's judgment of conviction be vacated and he be granted a new trial, or in the alternative, that Petitioner be granted a full plenary appeal, in the above-styled cause.

STOLBA, LUMLEY & DILLINGER, P. A.

By Robert H. Dillinger
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Attorneys for Petitioner
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(813) 345-1656

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to the Office of the Attorney General, 1313 Tampa Street, Suite 804, Tampa, Florida 33602, this 23rd day of March, 1982.

STOLBA, LUMLEY & DILLINGER, P.A.

By
ROBERT H. DILLINGER, ESQ.
Attorney for Petitioner